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No. 87-2049

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and DAKOTA, MINNESOTA & EASTERN RAILROAD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY IN RESPONSE TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Railway Labor Act overrides an Interstate Commerce Commission order authorizing railroad line sales to new carriers within the Commission's jurisdiction under 49 U.S.C. § 10901 to be consummated on seven days' notice, without protection for employees from the effects of the transactions, where application of Railway Labor Act requirements would prevent consummation of the sales as authorized by the Commission?

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BRIEF OF CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY IN RESPONSE TO PETITION FOR CERTIORARI

Respondent Chicago & North Western Transportation Company ("C&NW")[1] agrees with petitioner Railway Labor Executives' Association ("RLEA") that the question presented as to the proper accommodation between the Interstate Commerce Act and the Railway Labor Act is of overriding importance to the railroad industry, that review by this Court is required to resolve a square conflict among the circuit courts of appeals on the question presented, and that certiorari should therefore be granted.

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[1] C&NW's Statement under Rule 28.1 appears in its Response to Motion to Expedite Consideration of Petition for Certiorari, filed June 24, 1988.

STATEMENT OF THE CASE

This case is the first of a series of pending cases[2] in which RLEA and its member unions have attempted to invoke the "status quo" provisions of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, to enjoin sales of rail line under § 10901 of the Interstate Commerce Act pending exhaustion of RLA major dispute procedures over the effects of the sales on the sellers' employees, although the Interstate Commerce Commission ("ICC") has authorized consummation of such sales on an expedited basis without protection of employees from the effects of the sales, pursuant to a class exemption order and regulations promulgated under § 10505 of the Act. *Ex Parte No. 392 (Sub-No. 1)—Class Exemption For The Acquisition & Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1986), codified at 49 C.F.R. §§ 1150.31-34, *aff'd mem. sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).

Respondent C&NW, which like other Class I rail carriers has had serious revenue adequacy problems for years,[3] has been obliged to abandon more than 5000

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[2] See *RLEA* v. *City of Galveston*, No. 87-6169 (5th Cir. June 23, 1988); *RLEA* v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *petition for certiorari pending*, No. 87-1888; *Chicago & N.W. Transp. Co.* v. *RLEA*, No. 88-C-444 (N.D. Ill. Mar. 16, 1980), *appeal pending*, No. 88-1504 (7th Cir.); *United Transp. Union* v. *Burlington N. R.R.*, 672 F. Supp. 1579 (D. Mont. 1987), *appeal pending*, No. 87-4386 (9th Cir); *CSX Transp. Inc.* v. *United Transp. Union*, No. CIV-87-1147C (W.D.N.Y. June 2, 1988), *appeal pending*, No. 88-7461 (2d Cir.); *Burlington N. R.R.* v. *United Transp. Union*, No. 86-5013-CV-SW-0 (W.D. Mo.); *RLEA v. Association of American Railroads*, No. 87-2145 (D.D.C.); *RLEA* v. *Soo Line R.R.*, No. 87-0696-CV-W3 (N.D. Ill.); *RLEA* v. *MT Properties, Inc.*, No. 3-87-493 (D. Minn.).

[3] No Class I railroad has been "revenue adequate" for the past several years—none of them have generated sufficient revenues from their rail operations to cover their costs and yield a reasonable

miles of its track in the past decade alone. (J.A. 47, 53).[4] In *Ex Parte No. 392*, however, the ICC attempted to alleviate the need for such abandonments, with their attendant loss of railroad jobs and service, by providing railroads in C&NW's position with an alternative means of disposing of marginal or unprofitable lines: sales and other transfers to new short line or regional railroads that typically have lower operating costs than the larger carriers.

In *Ex Parte No. 392*, the ICC exercised its exemption authority under § 10505 of the Act to relieve sales to new entrants into the industry from detailed prior review requirements under § 10901, substituting an expedited "method * * * to acquire Commission approval" under which these sales may be consummated upon seven days' notice to the Commission. 1 I.C.C. 2d at 811, 820.[5] The ICC also declined RLEA's request that labor protective conditions be imposed on these transactions. The Commission determined that formal labor protection was not needed, because sales of these lines to new carriers ordinarily preserve jobs for rail employees that would otherwise ultimately be lost in abandonments, and thus constitute the best protection available in most cases, and also that the cost of further labor protection conditions would "discourage acquisitions and operations that should be encouraged." *Id.* at 814-15. However, the ICC recognized that in "an extraordinary case" addi-

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return on investment. See *Railroad Revenue Adequacy—1986 Determination*, 3 I.C.C. 2d 966 (1987); *Railroad Revenue Adequacy—1985 Determination*, 3 I.C.C. 2d 541 (1987); *Railroad Revenue Adequacy—1984 Determination*, 1 I.C.C. 2d 615 (1986); *Railroad Revenue Adequacy—1983 Determination*, 1 I.C.C. 2d 734 (1984).

[4] "J.A." citations refer to the Joint Appendix in the court of appeals. "Pet." citations refer to the Petition for Certiorari, and "App." citations refer to its Appendices.

[5] The ICC has since extended the preconsummation notice period for certain large-scale § 10901 transactions to 35 days. 53 Fed. Reg. 5981 (Feb. 29, 1988).

tional labor protection arrangements might be warranted, and reserved jurisdiction to resolve disputes over labor protection on petitions for revocation of the class exemption in particular cases under § 10505(d) of the Act. *Id.* at 815. RLEA appealed the ICC's labor protection ruling to the United States Court of Appeals for the District of Columbia Circuit, which affirmed *per curiam* "for the reasons set forth in the decision of the Commission." *Illinois Commerce Comm'n* v. *ICC*, *supra*. RLEA did not seek certiorari.

In August 1986, C&NW and respondent Dakota, Minnesota & Eastern Railroad ("DM&E") obtained ICC authority under *Ex Parte No. 392* for the sale to DM&E of C&NW's line between Winona, Minnesota and Rapid City, South Dakota. *Dakota, M. & E. R.R.—Acquisition & Operation Exemption*, 51 Fed. Reg. 32260 (Sept. 10, 1986). That line had previously been the subject of abandonment proceedings before the ICC, and at the time of the sale was in part inoperable due to debilitation of the track (J.A. 207, 215-25, 226, 230). Indeed, only some 169 C&NW employees were deployed along the line—most of whom DM&E offered to employ. (J.A. 60, Pet. 6).

Nonetheless, RLEA's member unions opposed the sale, and when it was announced in July 1986 they served notices upon C&NW, ostensibly under § 6 of the RLA, demanding that C&NW and DM&E agree to provide the labor protection that the ICC had declined to grant in *Ex Parte No. 392*.[6] RLEA then brought suit on August 19, 1986, against C&NW and DM&E in the United States District Court for the District of Minnesota, claiming that C&NW was obliged to exhaust RLA "ma-

[6] The union notices sought so-called *New York Dock* and *Oregon Short Line III* protections, the conditions that the ICC typically imposes on rail mergers and abandonments, respectively. See *New York Dock Ry.—Control—Brooklyn E.D. Terminal*, 360 I.C.C. 60 (1979), *aff'd*, 609 F.2d 83 (2d Cir. 1979); *Oregon Short Line R.R.—Abandonment*, 360 I.C.C. 91 (1979).

jor dispute" procedures with respect to the effect of the sales on employees, and that the Act's "status quo" requirements for major disputes prohibited consummation of the sale in the meantime.

On August 27, 1986, the district court denied RLEA's motion for a preliminary injunction against the sale. (App. 9a-11a). The sale was therefore consummated on September 4, 1986. RLEA thereafter abandoned any claim that the sale should be undone, but continued to claim that consummation violated the RLA status quo requirements and sought back pay for employees affected by that alleged violation, and sought to require C&NW to submit the dispute over labor protection in the sale to RLA major dispute procedures. On January 7, 1987, the district court granted motions by C&NW and DM&E for summary judgment, holding that a "decision favorable to the plaintiff would put this Court directly at odds with the regulatory scheme established by *Ex Parte No. 392*," where the ICC indicated "that it is the final authority in determining whether to impose labor protection in the sale of lines to new carriers," and that "[b]ecause the relief that plaintiff is seeking is so at odds with the ICC order in the present case, the only recourse it has is to the Court of Appeals, which has * * * exclusive authority to modify or rescind *Ex Parte No. 392*." (App. 6a-7a).

On appeal, the Eighth Circuit affirmed, holding that "the provisions of the ICA governing labor protective agreements supersede the mandatory bargaining requirements of the RLA." (App. 4a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Although C&NW prevailed in this case, and in our view the judgment below was clearly correct, the decision below conflicts squarely with that of the United States Court of Appeals for the Third Circuit in *RLEA* v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *petition for certiorari pending*, No. 87-1888, and

that of the United States Court of Appeals for the Fifth Circuit in *RLEA* v. *City of Galveston*, No. 87-6169 (5th Cir. June 23, 1988). The uncertainty engendered by this split in the circuits has called a practical halt to pending *Ex Parte No. 392* sales and thus threatens to undermine the ICC's policy of encouraging such sales, leading to railroad bankruptcies and abandonments of lines that might otherwise be salvaged in the hands of new operators. Accordingly, although C&NW would prefer a denial of certiorari, it agrees with RLEA that "the issues presented by this and other similar cases are important to the industry and need to be resolved by this Court." (Pet. 12).

ARGUMENT

This Case Presents Issues Of Critical Importance To The Railroad Industry, Its Employees, and The Public Interest As To Which The Courts of Appeals Are In Conflict

1. As RLEA points out, there is perhaps no more important issue between rail management and labor than the extent to which Railway Labor Act major dispute and status quo provisions may be enforced to restrain the consummation of *Ex Parte No. 392* transactions without the labor protections that the ICC has determined to be contrary to the public interest. The court below held that Railway Labor Act major dispute procedures are "superseded" by the Interstate Commerce Act provisions for ICC determination of labor protection issues in transactions within its jurisdiction under § 10901. That holding is firmly rooted in decisions of this Court such as *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 319-20 (1981), which recognized that the ICC's jurisdiction under the predecessor provision to § 10901 is "exclusive and plenary,"[7] and *United States*

[7] *Kalo Brick* construed former § 1(18) of the Act, which in 1976 was divided into abandonment provisions now codified at § 10903 and acquisition provisions now codified at § 10901; the recodification did not affect the scope of the ICC's authority over transactions formerly governed by § 1(18). See 450 U.S. at 319-21.

v. *Lowden*, 308 U.S. 225, 235-36 (1939), which recognized that the ICC's discretionary power over the "granting and withholding of" labor protection is "an essential aid to the maintenance" of the interstate railroad system "uninterrupted by labor disputes * * *."[8] It likewise is firmly rooted in the history of the ICC's labor protection authority under the ICA; for over 50 years disputes over protection of employees from the effects of transactions requiring ICC authorization have been determined by the ICC pursuant to that authority, rather than under the RLA, when the parties could not resolve the issues by voluntary agreement. And, when labor has been dissatisfied with the ICC's decisions it has turned to Congress, rather than to the RLA, obtaining numerous refinements and modifications by Congress of the ICC's comprehensive protection authority.[9]

Nonetheless, in *Pittsburgh & Lake Erie*, *supra* (sometimes referred to as *"PL&E II"*), the Third Circuit reached a decision that conflicts directly with the decision below in this case. In *PL&E II* the Third Circuit affirmed an injunction against an *Ex Parte No. 392* sale while labor protection disputes are processed under the "long and drawn out,"[10] "almost interminable"[11] RLA major dispute procedures, which may culminate in strikes and nationwide secondary picketing if the parties fail to agree,[12] even though the court recognized that its holding "may well have the practical effect of torpedoing the sale." 845 F.2d at 429. The Fifth Circuit recently adopted the Third Circuit's reasoning to reach the same result in *RLEA v. City of Galveston*, *supra*. We submit

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[8] See *ICC* v. *Railway Labor Ass'n*, 315 U.S. 373, 375 (1942).

[9] See, *e.g.*, *Simmons* v. *ICC*, 760 F.2d 126, 130 (7th Cir. 1985) (noting active participation of rail unions in "revisions of the Interstate Commerce Act").

[10] *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 246 (1966).

[11] *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969).

[12] *Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841 (1987).

that the holdings of the Third and Fifth Circuits are incorrect, but litigation over the issue continues in other courts,[13] and there is no possibility that the conflict among the Eighth, Third, and Fifth Circuits will be resolved without this Court's intervention.

Although we believe that the judgment below was plainly correct, and the Third Circuit's decision plainly incorrect, and although that decision is also before this Court on petition for certiorari, RLEA has suggested elsewhere that the *P&LE* case may be mooted in the near future;[14] if so, the questions presented there and here may evade resolution by this Court for some time to come unless certiorari is granted in this case.

2. The questions presented warrant immediate review by this Court because they are of paramount importance to the railroad industry. The *Ex Parte No. 392* decision was expressly intended to stem the tide of railroad abandonments that had resulted from the financial decline of the industry during the past decades. As the ICC recently explained:

> "Abandonment, by its nature, is most often a painful, disappointing process. It normally entails the permanent loss of jobs and railroad service, even though it has not always occurred in markets that are inherently unserviceable by rail. Markets that produce losses when operated by Class I railroads can produce profits for smaller, more efficient local carriers. These new carriers are potentially beneficial to nearly all concerned. They preserve rail service for the local economies and provide traffic feed for the larger carriers, enhancing employment prospects for rail labor—both on the smaller lines and throughout a reinvigorated Class I system."

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[13] See *supra* n.2.

[14] See Brief of Respondent Railway Labor Executives' Association In Response to the Petition, p. 5, *P&LE II* (No. 87-1888).

FRVR Corp.—Exemption Acquisition & Operation—Certain Lines of Chicago & N.W. Transp. Co.—Declaratory Order, ICC Finance Docket No. 31205, p. 1 (served Jan. 29, 1988), *petition for review pending*, No. 88-1280 (8th Cir.).

Moreover, as the ICC has noted, until the recent spate of litigation over the applicability of the RLA to § 10901 sales and union strikes and strike threats over labor protection demands in connection with such sales, "[t]he Commission's policy ha[d] been validated by practical results. New railroad formation quickened, abandonments fell, service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved." *Id.* pp. 2-3. However, RLEA's attempts to enjoin line sales under *Ex Parte No. 392* or alternatively to strike to prevent them and the conflicting decisions in the lower courts with respect to those efforts are "threatening to halt the revitalization of the marginal railroad sectors—a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public." *Id.* p. 6.

In short, it is agreed by all concerned—RLEA, the ICC, and the railroad industry [15]—that the questions presented here are crucially important for the future of this industry, and also for its employees and the public that relies on it. Prolongation of present uncertainties will inevitably lead to further unnecessary contraction of the industry and employment opportunities in it. The question presented by this case requires prompt resolution by this Court.

3. This case should not be held for any other pending cases; we urge the Court to rule on the petition for certiorari at this time.

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[15] See Brief For The National Railway Labor Conference As Amicus Curiae In Support of the Petition, *P&LE II* (No. 87-1888).

a. RLEA has suggested that *RLEA* v. *Guilford Transp. Industries, Inc., petition for cert. pending*, No. 87-1911 ("*Guilford*"), should serve as a vehicle for resolution of issues concerning labor protection in ICC-authorized transactions.[16] *Guilford* has nothing to do with the question presented by this case and the conflict in the courts of appeals with respect to that question, however. The question here is whether the RLA can be used to block sales within the ICC's jurisdiction under § 10901. *Guilford*, on the other hand, concerns an entirely different provision of the ICA, § 11343, and the applicability of the express immunity provision for § 11343 transactions in § 11341(a) of the Act to RLA major dispute procedures in a context in which the ICC lacks the power to withhold labor protective conditions. It is thus both legally and factually distinguishable from this and other pending § 10901 cases. Moreover, as RLEA has conceded, the *Guilford* case too is dogged by the prospect of imminent mootness.[17] In any event, *Guilford* is not an appropriate vehicle, and cannot be a vehicle, to decide the question presented here, as to which the Third, Fifth, and Eighth Circuits are in direct conflict.

b. The ICC has suggested that all these cases be held in abeyance until after the Eighth Circuit acts on a petition for rehearing in *Burlington Northern R.R.* v. *United Transp. Union*, Nos. 87-2581 and 87-2600 (8th Cir. May 31, 1988) ("*Burlington Northern*").[18] That case presents a different issue, too. Following the ICC's rejection of its labor protection demands in *Ex Parte No. 392*, RLEA commenced a two-pronged attack on the

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[16] See Brief of Respondent Railway Labor Executives' Association In Response to the Petition, p. 3, *P&LE* II (No. 87-1888).

[17] Supplemental Brief of Petitioner Railway Labor Executives' Association, *et al.*, pp. 5-6, *Guilford* (No. 87-1911).

[18] See Memorandum of the Interstate Commerce Commission, *P&LE II* (No. 87-1888).

ICC's labor protection determination: First, it has sought injunctions against line sales in cases like this, claiming that the RLA overrides the Commission's authorization of such sales without labor protection, a claim that requires reconciliation of the RLA and the ICA (what we have called elsewhere the "RLA accommodation issue" [19]). Second, it has engaged in strikes against such sales, claiming that the Norris-LaGuardia Act ("NLGA") need not be accommodated to the ICA scheme for resolution of disputes over labor protection and therefore bars injunctions against such strikes, a claim requiring reconciliation of the NLGA and the ICA (the "NLGA accommodation issue"). This case and *PL&E II* present the first issue, the RLA accommodation issue. *Burlington Northern* presents the NLGA accommodation issue, which is also before this Court in the first *PL&E* decision (*"PL&E I"*), *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987), *petition for cert. pending*, No. 87-1589.

While the rail industry believes the NLGA accommodation issue should be decided by this Court and has urged the Court to grant certiorari in *PL&E I*,[20] the RLA accommodation issue presented by this case and *PL&E II*, and the NLGA accommodation issue, presented by *Burlington Northern* and *PL&E I*, are separate and distinct issues that can be briefed and decided separately, as, indeed, occurred below in the *PL&E* litigation. Moreover, the RLA accommodation issue presented by this case and *PL&E II* will not necessarily be decided by this Court in the NLGA accommodation cases: the Third and Eighth Circuits have reached the same result as to the NLGA accommodation issue in *PL&E I* and

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[19] Response of Chicago & North Western Transportation Company to Motion to Expedite Consideration of Petition for Certiorari, p. 3.

[20] See Brief For The National Railway Labor Conference As Amicus Curiae In Support of the Petition, *P&LE I* (No. 87-1589).

Burlington Northern, and diametrically opposed results as to the RLA accommodation issue in *PL&E II* and this case. It would be damaging to revitalization of marginal lines throughout the industry to postpone a decision of the issues pending the Eighth Circuit's decision on the petition for rehearing in *Burlington Northern*, which could take some months.[21] It would also be potentially damaging to C&NW, for the RLA accommodation issue needs resolution, and RLEA asserts back pay claims against C&NW which continue to mount pending a final decision.

c. Finally, this case should not be held in abeyance pending this Court's disposition of *PL&E II*. These cases both present the same issue, the RLA accommodation issue, as to which the decisions of the courts below are directly in conflict. Accordingly, both cases should be set down now for argument after the Court returns in October, particularly in view of suggestions that *PL&E II* may become moot. That would permit briefing during the summer and argument soon after the Court reconvenes, thus substantially expediting a decision by this Court on the important RLA accommodation issue presented by this case.

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[21] For example, the Eighth Circuit recently acted on a petition for rehearing in a Railway Labor Act case involving this Respondent that had been pending for nearly five months. *Beardsley* v. *Chicago & North Western Transp. Co.*, No. 86-1369 (8th Cir. June 15, 1988) (petition for rehearing filed Jan. 21, 1988).

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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